Supreme Court, U.S.
FILED
AUG 11 1992
OFFICE OF THE CLERK

No. 91-1785

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHARLES PLUMMER, SHERIFF
OF ALAMEDA COUNTY,

Petitioner,

v.

JAMES PETTAWAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
RONALD E. NIVER
Supervising Deputy Attorney General
JOAN KILLEEN HALLER
Deputy Attorney General
[Attorney of Record]
455 Golden Gate Avenue, Room 6200
San Francisco, California 94102
Telephone: (415) 703-2638
Attorneys for Petitioner

Table of Contents

	Page
JURISDICTION	1
ARGUMENT	2
THE QUESTION WHETHER THE COLLATERAL ESTOPPEL COMPONENT OF THE DOUBLE JEOPARDY CLAUSE SHOULD BE EXPANDED TO RETRIALS SOUGHT BY THE DEFENDANT WAS PROPERLY RAISED BELOW	2
CONCLUSION	8

Table of Authorities

	Page
Cases	
Adickes v. *Kress & Co.* 398 U.S. 144 (1970)	2
Ashe v. *Swenson* 397 U.S. 436 (1970)	5
Blonder-Tongue v. *University Foundation* 402 U.S. 313 (1971)	3
Grady v. *Corbin* 495 U.S. 508 (1990)	4
Lawn v. *United States* 355 U.S. 339 (1958)	2
Procunier v. *Navarette* 434 U.S. 555 (1978)	2
United States v. *Lewis* 798 F.2d 1250 (9th Cir. 1986)	3
United States v. *Mendenhall* 446 U.S. 544 (1980)	2
Youakim v. *Miller* 425 U.S. 231 (1976)	2
Other Authorities	
Supreme Court Rules rule 15.6	1

No. 91-1785

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHARLES PLUMMER, SHERIFF OF ALAMEDA COUNTY,

Petitioner,

v.

JAMES PETTAWAY,

Respondent.

REPLY TO BRIEF IN OPPOSITION

JURISDICTION

Petitioner files this reply brief pursuant to rule 15.6 of the Supreme Court rules.

ARGUMENT

THE QUESTION WHETHER THE COLLATERAL ESTOPPEL COMPONENT OF THE DOUBLE JEOPARDY CLAUSE SHOULD BE EXPANDED TO RETRIALS SOUGHT BY THE DEFENDANT WAS PROPERLY RAISED BELOW

Ordinarily, this Court will not decide questions that were neither raised before nor considered by the Court of Appeals. *United States* v. *Mendenhall*, 446 U.S. 544, 551-552, n. 5 (1980); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970). The rule is not inflexible, however, and this Court may find that exceptional circumstances warrant review of the question presented. *United States* v. *Mendenhall*, 446 U.S. at 551-552, n. 5; *Youakim* v. *Miller*, 425 U.S. at 234; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16 (1958).

The Court has considered issues essential to the analysis of the Court of Appeals' decision, even if not precisely delineated in the question presented. *United States* v. *Mendenhall*, 446 U.S. at 551-552, n. 5; *Procunier*

v. *Navarette*, 434 U.S. 555, 559-560, n. 6 (1978). The Court also has considered issues not presented in the petition for writ of certiorari or addressed by the parties in the briefing on the merits, but which were raised in a brief by *amicus curiae* and were addressed by the parties at oral argument. *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 319-320, & n. 6 (1971).

Respondent contends in his brief in opposition that petitioner did not timely present the issue raised here because it was first presented to the Court of Appeals in the petition for rehearing and rehearing en banc. Respondent contends that "[u]nder the Ninth Circuit's rules, arguments not timely presented are deemed waived, and this waiver doctrine applies to arguments raised for the first time in a petition for rehearing." Brief in Opposition at 8. Respondent does not cite a Ninth Circuit rule in support of this statement, and we have found none. Moreover, *United States* v. *Lewis*, 798 F.2d 1250 (9th Cir. 1986), cited by respondent, does not support the statement. In *Lewis*, the court stated only

that, "[b]ecause the government failed to raise this question in its brief or at oral argument, we decline to address it." 798 F.2d at 1250. The court did no more than exercise its discretion not to hear a particular argument.

In the instant case, the question presented *was* raised in and resolved by the Court of Appeals. The question was squarely presented in the petition for rehearing, which challenged the Court of Appeals' application of the rule announced in *Grady* v. *Corbin*, 495 U.S. 508 (1990) to the retrial of criminal charges. See Fed. R. App. P. 40. The Court of Appeals ordered respondent to file a response to the petition for rehearing. Subsequently, the Court of Appeals denied the petition. Having ordered the response, it must be assumed that the court did not engage in an idle act, but instead considered the petition and response on the merits. Significantly, respondent did not argue in his response to the petition for rehearing that the issue raised therein had been waived.

Contrary to respondent's assertion, Brief in Opposition at 8, although both parties cited *Grady* v. *Corbin* as to basic double jeopardy principles in their initial briefs, neither party argued, or indeed even considered, that *Grady* established the rule for the application of double jeopardy principles on retrial. To have done so would have fundamentally changed the analysis, because *Grady* eliminates collateral estoppel as an independent doctrine. Once a defendant shows that "to establish an essential element of an offense charged in that prosecution, the government will prove *conduct* that constitutes an offense for which the defendant has already been prosecuted," *Grady* v. *Corbin*, 495 U.S. at 510 (emphasis added), the narrowly defined doctrine of collateral estoppel no longer has any function. *Grady* shifted the focus from the issues that a jury must necessarily have decided, *Ashe* v. *Swenson*, 397 U.S. 436, 444 (1970), to the conduct that the government seeks to prove.

The Court of Appeals' application of *Grady* in the circumstances of this case, and the magnitude of the consequent change in the law of double jeopardy, put into sharp focus the issue whether collateral estoppel has *any* application in the retrial of criminal charges. We addressed that precise issue in our petition for rehearing, and address it before this Court. As we stated in our petition for writ of certiorari, the issue is of nationwide importance, as it affects every criminal case, state or federal, in which retrial follows verdicts of both acquittal and guilt.

The significance of the issue merits consideration under the exceptional circumstances exception, should this Court find that the issue was not properly raised in and resolved by the Court of Appeals. In *United States* v. *Mendenhall*, 446 U.S. at 551-552, n. 5, this Court considered a contention not raised below because the assumption of the trial court and the Court of Appeals rested "on a serious misapprehension of federal constitutional law." Similarly, in this case, the Court of

Appeals' decision rested on a serious misapprehension of the principles of double jeopardy. In addition, the evidentiary record in the trial court is sufficient to permit consideration of the question, which involves only issues of law. See *id.* Accordingly, no bar exists to this Court's consideration of the question presented.

As to the other contentions in the brief in opposition, we feel no reply is necessary, having addressed them in our petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, we respectfully request that the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Dated: August 10, 1992

DANIEL E. LUNGREN
Attorney General of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

RONALD A. BASS
Senior Assistant Attorney General

RONALD E. NIVER
Supervising Deputy Attorney General

Joan Killeen Haller

JOAN KILLEEN HALLER
Deputy Attorney General

Attorneys for Petitioner

JKH:ds